ORAL ARGUMENT NOT YET SCHEDULED

No. 16-7051

In the United States Court of Appeals for the District of Columbia Circuit

BUDHA ISMAIL JAM, KASHUBHAI ABHRAMBHAI MANJALIA, SIDIK KASAM JAM, RANUBHA JADEJA, NAVINAL PANCHAYAT, and MACHIMAR ADHIKAR SANGHARASH SANGATHAN,
Plaintiffs-Appellants,

v.

INTERNATIONAL FINANCE CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 15-cv-00612
The Honorable John D. Bates

BRIEF OF *AMICUS CURIAE* PROFESSOR DANIEL BRADLOW IN SUPPORT OF PLAINTIFFS-APPELLANTS

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August 16, 2016

COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

As required by Circuit Rule 28(a)(1), counsel for *amicus curiae* Daniel Bradlow certify as follows:

A. Parties and Amici. All parties, intervenors, and *amici* appearing before the district court and this Court are listed in the Brief for Appellants, apart from *amicus* Daniel Bradlow.

B. Rulings under Review. References to the rulings under review appear in the Brief for Appellants.

C. Related Cases. This case has not been before this Court before. *Amicus* is unaware of any related cases pending in this or any other court.

Certificate of Counsel Under Circuit Rule 29(d)

Amicus Daniel Bradlow is a professor of international law and a leading expert on the law governing international financial institutions—institutions like the defendant International Finance Corporation. *Amicus*, who has been involved in efforts to make international financial institutions more publicly accountable, files this brief to provide the Court with resources on the relevant principles of international law that must be interpreted and applied in this case. Because no other *amicus* brief contains this material, a separate brief is necessary.

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GLOSSARY

ICJ International Court of Justice

IFC International Finance Corporation

UN United Nations

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Professor Daniel Bradlow is one of the world's leading academic experts on the legal accountability of international financial institutions—institutions like the International Finance Corporation (IFC). This brief draws on that expertise as well as Professor Bradlow's years of experience as a consultant to the United Nations, the World Bank, the European Bank for Reconstruction and Development, and the African Development Bank—which he advised on the structuring of its independent accountability mechanism.

The appellants' brief shows why the IFC is not entitled to absolute immunity under the International Organizations Immunities Act, 22 U.S.C. § 288a(b). Without taking a position on the underlying controversy between the parties, Professor Bradlow files this brief to explain to the Court why that result is consistent with—and indeed *is required by*—international law.

Over time, the IFC's claimed functional immunity has evolved from a shield that protects the IFC from interference by its member states into a sword that wards off the claims of those who are adversely affected by the IFC's actions. But the IFC is required to comply with the requirements of customary international law, which mandates that it respect the right of persons adversely affected by its actions to have access to an effective remedy. The IFC has failed to satisfy that obligation.

Given this failure, the only way to protect the plaintiffs' right and to avoid helping the IFC commit an international wrong is to deny its claim of immunity.

In short, because the IFC is failing to fulfill its legal obligation to respect the plaintiffs' right of access to an effective remedy, its claim of absolute immunity must be denied to ensure that this Court does not inadvertently assist the IFC in committing a wrongful act under international law.

INTEREST OF *AMICUS CURIAE*[1]

Daniel Bradlow is a scholar of international law and a leading expert on the law governing international financial institutions. He has published fifteen academic articles in law journals and books on legal issues relating to international financial institutions, has co-edited a book on international financial institutions and international law, and has published numerous short articles in the media on the accountability of international organizations.

Professor Bradlow holds the South African Research Chair in International Development Law and African Economic Relations at the University of Pretoria's Faculty of Law and is Professor Emeritus at American University's Washington

[1] No counsel for a party authored the brief in whole or in part. Apart from *amicus* and his counsel, no person contributed money to fund its preparation or submission. Because counsel for appellee International Finance Corporation has refused to consent to this brief, *amicus* is concurrently filing a separate motion for leave to file this brief.

College of Law, where he was also the Director of the International Legal Studies Program. He is a member of the New York and District of Columbia bars.

Professor Bradlow has been a consultant to the World Bank, the European Bank for Reconstruction and Development, the United Nations Institute for Training and Research, the World Commission on Dams, and the African Development Bank—which he advised on the structuring of its independent accountability mechanism.

Previously, Professor Bradlow was the first Head of the International Economic Relations and Policy Department at the South African Reserve Bank, and was Chair of the Roster of Experts for the Independent Review Mechanism at the African Development Bank. He was also a member of the International Law Association's Committee on Accountability of International Organizations and the African Commission on Human and People's Rights Working Group on Extractive Industries, the Environment, and Human Rights; and served as an advisor on international law to the Global Initiative on Fiscal Transparency.

Given the focus of his expertise and experience, Professor Bradlow has a strong interest in ensuring that the applicable principles of international law are appropriately interpreted and applied by this Court. He has not investigated the underlying facts in this case and therefore takes no position on the accuracy of either party's characterization of those facts.

ARGUMENT

I. Over time, the functional immunity claimed by the IFC has evolved from a shield that protects the IFC from interference by its member states into a sword that wards off the claims of those who are adversely affected by its actions.

The IFC was created by a treaty signed and ratified by its member states.[2] It is therefore an international organization with the status of a subject of international law. This means that the IFC has all the rights and duties that pertain to international organizations as subjects of international law.

One of the rights that the IFC has, as an international organization, is immunity from the jurisdiction of the courts of its member states. Article VI, Section 1 of its Articles of Agreement states that the IFC, "to fulfill the functions with which it is entrusted," shall have the immunities set out in the article. The Article stipulates that the IFC shall be immune from taxation,[3] and its assets,[4] archives,[5] and communications[6] shall also have immunity. Moreover, its officials are immune from the jurisdiction of its member states "with respect to acts performed . . . in their official capacity."[7] Article I of its Articles of Agreement

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[2] IFC Articles of Agreement (as amended through June 27, 2012), available at http://bit.ly/2bnPz4q.

[3] *Id.* art. VI, § 9.

[4] *Id.* art. VI, § 4.

[5] *Id.* art. VI, § 5.

[6] *Id.* art. VI, § 7.

[7] *Id.* art. VI, § 8.

stipulates that the function of the IFC is to "further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas."[8] Article I explains that the types of activities that the IFC may engage in include: "financing the establishment, improvement and expansion of productive private enterprises which would contribute to the development of its member countries"[9] and helping "create conditions conducive to[] the flow of private capital, domestic and foreign, into productive investment in member countries."[10]

The IFC's founders did not contemplate that the functional immunity of the IFC itself would be absolute. To the contrary, Article VI Section 3 of the IFC's Articles of Agreement specifically anticipates that the IFC itself can be sued. It states: "Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities."[11] This limitation on immunity is in fact necessary for the IFC is to fulfill its purpose of promoting the development of the

[8] *Id.* art. I.
[9] *Id.* art. I(i).
[10] *Id.* art. I(iii).
[11] *Id.* art. VI, § 3.

private sector. It would not be possible for the IFC to participate in financial markets if, in appropriate circumstances, it were not amenable to suit.

The fact that the IFC's immunity is limited by its own terms is also consistent with the general consensus regarding international-organization immunity. The international community, even prior to the IFC's establishment, had anticipated that specialized agencies of the United Nations (UN), like the IFC, would forego their immunity in appropriate circumstances. Article IX, Section 31 of the Convention on the Privileges and Immunities of the Specialized Agencies of the UN states that, because the international organization is immune from judicial authority, it is expected to provide "appropriate modes of settlement" for disputes arising from the contracts that it enters into and for "other disputes of a private law character" in which it is a party.[12] This requirement is particularly relevant in this case, which involves an alleged tort committed by the IFC in a private-sector project.

The IFC's failure to provide an "appropriate mode of settlement" in this case raises serious concerns about its use of its immunity. In this regard, the Convention contemplates that the specialized agencies can abuse their immunity even in regard to their member states. Article VII, Section 24 of the Convention

[12] United Nations Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations art. IX, Nov. 21, 1947, 33 U.N.T.S. 521. It is important to note that the US is not a signatory to this Convention.

provides that a state alleging that an international organization has abused its immunity may submit the question of the abuse for an advisory opinion of the International Court of Justice (ICJ).[13] If the court finds abuse, the state has the right to deny the organization the benefits of the privilege or immunity that has been abused.

At the time the Convention was drafted, it was not expected that international organizations would have any direct dealings with non-state actors, such as individuals or communities, in their member states without the consent of the governments of these states. Therefore, the Convention makes no provision for claims of abuse made by non-state actors who cannot take their claims to the ICJ.

The UN and its specialized agencies were granted immunity at a time when their ability to function independently and effectively was uncertain. After the Second World War, the architects of these international organizations, mindful of the failure of the League of Nations, were unsure how member states would respond when these international organizations began implementing their assigned functions. Granting immunity to the UN and its specialized agencies, therefore, was part of their efforts to ensure that international organizations had the capacity

[13] *Id.* art. VII.

to perform their intended functions.[14] Fortunately, concerns that states might use their authority over international organizations operating in their territories to interfere with or undermine them have proven to be largely unfounded. With rare exceptions, member states have respected the legal and operational independence of international organizations and their officials.[15]

In fact, member states have demonstrated such confidence in international organizations that over time they have acquiesced, either explicitly or implicitly, as these organizations have broadened their functions. One consequence of this expansion has been an increase in the number and intensity of direct interactions between the organizations and the citizens of member states, often without any necessary prior approval by their governments. As a result, the organizations' own actions can now directly and adversely affect citizens of these states.

This creates a troubling possibility: that international organizations can interact with non-state actors without any accountability to those harmed by their operations. As their work has expanded, international organizations have claimed that their immunity covers these new activities, including their interactions with the

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[14] *See, e.g.*, UN Charter art. 105, available at http://bit.ly/1jiDrnL; and International Bank for Reconstruction and Development Articles of Agreement art. VII, Dec. 27, 1945, available at http://bit.ly/2b1kZxY.

[15] *See*, *e.g.*, *Applicability of Article IV, Section 22, of the Convention on Privileges and Immunities of the United Nation* (Mazilu Case), 1989 I.C.J. 177 (Dec. 15); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Cumaraswamy Case), Advisory Opinion, 1999 I.C.J. 62 (April 29).

non-state actors in their member states. This means that, *de facto,* the international organizations have converted the immunity that was primarily intended to shield them from interference by member states into a sword with which they can ward off attempts by non-state actors to hold them accountable for their actions.

The IFC is a good example of an international organization whose expanding scope of operations has resulted in more intense interactions with the citizens of its member states. One area in which this can be seen clearly is the growing attention the organization pays to the environmental and social impacts of the projects it finances, as well as the efforts it has made to develop and implement its Sustainability Framework.[16] The framework consists of its Policy on Environmental and Social Sustainability, which defines the IFC's responsibilities, and its performance standards, which define the client's responsibilities in regard to environmental and social factors. The framework also includes an information disclosure policy—an indication that the IFC anticipated that its framework would become known to all stakeholders in the projects that it finances.

In brief, the framework requires IFC staff to both comply with their own obligations under the policy and ensure that its clients meet their obligations under the performance standards. The net effect of this framework, therefore, is to make

[16] *See* International Finance Corporation, IFC Sustainability Framework, http://bit.ly/2aXFCJQ.

the IFC part of the decision-making process in regard to the social and environmental aspects of the projects in which it participates.

But the IFC, unlike all the other actors in this decision-making process, cannot be held accountable for the adverse impacts that these decisions have on the various stakeholders in its operations.[17] The private companies involved in the project and with which the IFC works are amenable to suit, at a minimum, in the courts of the country in which the project is located. The government of the member state, if it is a participant in the project, can *similarly* be held legally or politically accountable by the citizens who have been harmed by the project in the member state.

To date, the IFC has successfully avoided being held accountable by those who claim to have been harmed by its operations for two reasons. First, the IFC's claim of immunity appears to inhibit lawsuits against it.[18] Second, vulnerable groups like the plaintiffs here do not have access to any forum, including a domestic court, in which they can seek to hold the IFC accountable for its actions.

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[17] Armin von Bogdandy, *et al.*, *The Exercise of Public Authority by International Institutions* (2010).

[18] August Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts* (2013). This book, which is a detailed discussion of cases in courts around the world against international organizations, includes very few cases against the IFC. This is particularly noteworthy given the scale and nature of its operations. *See also* Pieter H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (1994).

The IFC has suggested that its Compliance Advisor Ombudsman provides a forum in which these stakeholders can seek to have their claims addressed. But the ombudsman's operational guidelines explicitly state that it is not a legal enforcement mechanism and is not a substitute for international courts or court systems.[19] Moreover, the IFC's management and board are free to ignore the findings and recommendations of the Compliance Advisor Ombudsman—calling into question whether it is an effective remedy for vulnerable groups like the plaintiffs.[20]

II. The IFC has an obligation under customary international law to respect the plaintiffs' right of access to an effective remedy.

The IFC, as a subject of international law, is bound by whatever treaties it has signed and by customary international law.[21] To date, the IFC is not a signatory to any applicable treaties. However, customary international law has evolved since the adoption of the International Organizations Immunity Act in 1945 and the establishment of the IFC in July 1956. Today, customary international law imposes an obligation on the IFC to respect the plaintiffs' right of access to an effective remedy.

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[19] International Finance Corporation, Compliance Advisor Ombudsman Operational Guidelines, § 1.1, http://bit.ly/2aRZHpv.

[20] *Id.*, § 5.

[21] Statute of the International Court of Justice art. 38(1), June 26, 1945.

At the time the IFC was established, the major international-human-rights treaty dealing with civil and political rights had not been adopted or entered into force.[22] The International Covenant on Civil and Political Rights was only adopted and opened for signature by states in 1966 and entered into force in 1976.[23] It has now been signed and ratified by 168 states, including the United States. Article 2, Section 3(a) provides that any person whose international human rights are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."[24] The Article also stipulates that any person claiming such a remedy "shall have his right[s] . . . determined by competent judicial, administrative . . . authorities, or by any other competent authority provided for by the legal system of the State."[25] The obligation to provide a right of access to an effective remedy is so widely recognized by states that it has become part of customary international law.[26]

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[22] One regional agreement, the European Convention on Human Rights, had entered into force but this was no applicable to the majority of developing states in which the IFC would operate. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at http://bit.ly/1foTq0D.

[23] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

[24] *Id.* art. 2, § 3(a).

[25] *Id.* art. 2, § 3(b).

[26] Dinah Shelton, *Remedies In International Human Rights Law* 182 (1999); Ibrahim F.I. Shihata, *International Finance and Development Law* 155,165 (2001).

Almost all states have signed and ratified international treaties that enshrine this obligation. It is included in the following treaties and declarations:

- International Covenant on Civil and Political Rights, which has been ratified by 168 states;[27]
- the Universal Declaration of Human Rights, adopted with 48 votes in favor, none against, and eight abstentions;[28]
- International Convention on Elimination of All Forms of Racial Discrimination, which has been ratified by 177 states;[29]
- American Convention on Human Rights, which has been ratified by 25 states (although two have subsequently denounced the convention). It has also been signed but not ratified by the United States.[30]
- African Charter on Human and Peoples' Rights, which has been ratified by 53 states;[31]
- Arab Charter on Human Rights, which has been ratified by 13 states;[32]

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[27] International Covenant on Civil and Political Rights, *supra*, art. 2 §§ (3)(a), (3)(b); *Id.* art. 14 § (1).

[28] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948).

[29] International Convention on the Elimination of All Forms of Racial Discrimination art. VI, Dec. 21 1965, 660 U.N.T.S. 195.

[30] American Convention on Human Rights art. 25, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, Nov. 22, 1969, available at http://bit.ly/11gxuz8.

[31] African Charter on Human and Peoples' Rights art. 7.1, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

[32] Arab Charter on Human Rights art. 12, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force on March 15, 2008.

- European Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by 47 states;[33]
- ASEAN Human Rights Declaration, which was adopted by 10 states;[34] and
- Vienna Declaration and Program of Action, which was adopted by 171 states by consensus.[35]

Moreover, the states of the world have incorporated the right to an effective remedy into their domestic laws.[36] Not a single state has persistently objected to an understanding of this right being a principle of customary international law. Thus, it is clear that the right to an effective remedy is not only part of state practice but also seen as a legal obligation (opinion juris)—thereby meeting the requirements for a principle of customary international law.[37]

Because the right to an effective remedy is recognized as a principle of customary international law, it is a legally binding obligation on all subjects of international law, including the IFC.

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[33] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222.

[34] ASEAN Human Rights Declaration principle 5, adopted at the 21st ASEAN Summit, Phnom Penh, Cambodia, Nov. 18, 2012, available at www.aichr.org.

[35] Vienna Declaration and Program of Action art. 27, U.N. Doc A/CONF.157/23 (June 25, 1993).

[36] Tom Ginsburg & Rosalind Dixon, *Comparative Constitutional Law* (2011).

[37] James Crawford, *Brownlie's Principles of Public International Law* 3 (2008).

III. The IFC has failed to comply with the plaintiffs' right to access to an effective remedy.

Courts have recognized the requirement that international organizations, as subjects of international law, must respect the plaintiffs' right of access to an effective remedy. For example, the European Court of Human Rights, while acknowledging that international organizations' immunity should be respected, has stated that this needs to be balanced against the claimant's right to an effective remedy.[38] It has thus held that international organizations' immunity should be respected only provided they offer the claimants a "reasonable alternative means to protect effectively their rights."[39] Other European courts have followed this decision, setting out guidance for what could be considered a true "reasonable alternative."[40] In cases involving employees of international organizations, they have usually found that the existence of an administrative tribunal constitutes a reasonable alternative means.[41] In making this determination, they have relied on the fact that these tribunals have independent judges, offer claimants a predictable and fair process, and provide the possibility of a meaningful remedy. To conform to the

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[38] *Waite and Kennedy v. Germany*, App. No. 26083/94, 30 E.H.R.R. 261 (2000); *Beer and Regan v. Germany,* App. No. 28934/94, 33 E.H.R.R. 3 (2001).

[39] *Waite and Kennedy*, *supra,* at ¶ 68.

[40] *See, e.g., Beer and Regan*, *supra*, at ¶ 58.

[41] *Waite and Kennedy*, *supra*, at ¶ 68; *Beer and Regan* at ¶ 58.

reasonable-alternate-means standard, this remedy need not be identical to what would be obtainable in a court.[42]

Courts in other countries have also on occasion shown a willingness to deny international organizations claim of immunity. Most often, courts have made this determination about immunity in cases involving either employees of international organizations or parties that have a contractual relationship with an international organization.[43]

Some cases in the United States, relying on the International Organizations Immunity Act, [44] have been more respectful of international-organization immunity.[45] But none of these cases address customary international law and its implications for immunity in cases where the organization fails to provide an effective remedy.

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[42] *See, e.g., X v. European Patent Organization*, Gerechtshof's Gravenhage (Dutch Court of Appeals of the Hague), Sept. 28, 2007, No. BB5865, 06/1390. (Court held that it suffices that the international organization provides "comparable legal protection, which implies less far-reaching review."); *Siedler v. Western European Union*, I.L.D.C. 53 (BE 2003) (In this case before the Brussels Labour Tribunal, the court examined the internal procedure concerning administrative disputes within the international organization in detail to judge whether it was providing fair and equitable legal process.).

[43] *See, generally* Reinisch, *supra*.

[44] 22 U.S.C. § 288; *see, e.g.* , *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983); *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998); *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010).

[45] *Mendaro*, 717 F.2d at 610, 613–614; *Atkinson*, 157 F.3d at 1340; *Brzak*, 597 F.3d at 112–113.

To be sure, customary international law does not require organizations to provide the effective remedy themselves. It requires instead that the affected stakeholders have access to a forum capable of offering them a meaningful remedy to the harm caused by the international organization.

IV. The IFC has not offered these plaintiffs, unlike its other stakeholders, a reasonable alternative means of effective remedy.

The IFC offers a reasonable alternative means of seeking a remedy to all its stakeholders except for one major group: those who have no contractual relationship with it, but allege they have been harmed by its actions. The plaintiffs in this case are a good example of the type of non-contractual stakeholders who are not offered a reasonable alternative remedy by the IFC.

To demonstrate the validity of this proposition, it is necessary to first discuss the remedies that the IFC offers to all other stakeholders.

The IFC's stakeholders are its member states, its employees, its creditors, suppliers, consumers, and consultants, and those communities and individuals that are directly impacted by the projects that it helps support.

Member states participate in the governance structures of the IFC and, in principle, can hold the organization accountable through those structures. Specifically, IFC member states appoint a representative to its Board of Governors

and are represented on the Board of Executive Directors of each institution.[46] This means that if a state feels aggrieved by the IFC's decisions or actions, it can raise those concerns and have them addressed in the IFC's governance bodies.

The IFC's employees are able to seek an effective remedy for their employment-related claims in the World Bank Group's Administrative Tribunal. The World Bank describes the tribunal as "an independent judicial forum . . . for the resolution of cases submitted by members of the staff of the Bank Group."[47] The decisions of this independent body "are final and binding."[48]

The IFC's creditors, suppliers, and consultants are granted access to a remedy through their contracts with the organization. Contracts with international organizations, like the IFC, usually entitle these stakeholders to take the organization to arbitration if they are unable to satisfactorily resolve their grievance through negotiation. Similarly, IFC's clients are able to rely on their contractual rights to resolve their disputes with the organization. Unless the parties have agreed to arbitration in their contracts, these cases can be brought in courts.

Unlike members of these other groups, non-contractual stakeholders like the plaintiffs here have access to no comparable forum. Unless the court denies the IFC's claim of immunity in a particular case, they cannot bring a claim against the

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[46] IFC Articles of Agreement art. IV.

[47] World Bank Administrative Tribunal, http://bit.ly/2bfl2VH.

[48] *Id.*

IFC in any domestic court.[49] Their own governments are unlikely to take up their cases, because often these governments have either actively or passively supported the operation that has caused the problem. Existing international forums cannot accept these cases. Individuals and communities do not have access to the International Court of Justice.[50] The international forums that they can access, such as international human rights bodies, are not empowered to hear claims directly against the IFC because the organization is not a signatory to the relevant treaties. The only channel available to them is the Compliance Advisor Ombudsman, whose findings and recommendations the management and boards of the IFC are free to—and in fact on occasion do—ignore.

The claim that the IFC is failing to meet its customary international legal obligation by ignoring non-contractual stakeholders' right of access to an effective remedy raises an important question: Can a court in one of its member states determine if an international organization, like the IFC, is meeting its international legal obligation to respect the right of access to an effective remedy?

Generally, an international organization's functional immunity is a procedural and not a substantive privilege. This means that, to the extent the IFC's claim of immunity serves to protect the organization from having to appear before

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[49] *See* Reinisch, *supra*.

[50] "Only States may be parties in cases before the Court." Statute of the International Court of Justice art. 34(1).

a domestic court, it does not prevent the court from determining if the IFC is meeting its international legal obligation to provide an effective remedy.[51] However, the court must be careful to respect the independence of the IFC in making this decision. If it does not do so, the court runs the risk of inadvertently interfering with the IFC's operations, thereby undermining an important rationale for its functional immunity. On the other hand, if domestic courts cannot intervene to ensure that the IFC offers its citizens a reasonable alternative means for protecting their rights when they are harmed by the IFC's operations, they may, in effect, help it violate international legal obligations and deny the plaintiffs their human right of access to an effective remedy.

This suggests that in order for courts to appropriately balance these competing risks, they need to determine the criteria that can be used to determine if the international organization is offering an effective remedy.

The customary international legal principle of a right of access to an effective remedy does not specify what qualifies as an effective remedy. The European Court of Human Rights has provided some guidance on the criteria that should be looked at in determining whether an international organization is providing a reasonable alternative means of remedy, explaining that the forum should be

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[51] *See, generally, Judicial Decisions on the Law of International Organizations* (Cedric Ryngaert, Ige F. Dekker, Ramses A. Wessel, & Jan Wouters eds., 2016), and cases cited therein. *See also* Malcolm N. Shaw, *International Law* (2012).

independent, impartial, and fair, and that the remedy should be meaningful.[52] In these cases, the court has usually concluded that the international organization offers a reasonable alternative means largely because the cases involve employees, and the international organization's administrative tribunal satisfies the four criteria identified above.

Other sources can help enrich our understanding of the criteria to be used in assessing what constitutes a reasonable alternative remedy for non-contractual stakeholders. A particularly useful instrument is the UN Guiding Principles on Business and Human Rights, which explicitly addresses alternative remedies to judicial forums.[53] It does this in the context of business activities, which are analogous to the operations of the IFC in the sense that they involve projects, decisions, and activities that directly impact non-contractual stakeholders. The principles are particularly relevant here because they have influenced the Sustainability Framework of the IFC.[54] Pillar 3 of the principles stipulates that companies, as part of their human rights responsibilities, have a responsibility to

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[52] *Golder v. United Kingdom*, App. No. 4451/70, 1 E.H.R.R. 524 (1979–1980); *Waite and Kennedy*, *supra,* at ¶ 50; *Beer and Regan*, *supra*, at ¶ 40; *Osman v. United Kingdom,* App. No. 23452/94, 29 E.H.R.R. 245 (2000).

[53] United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04 (2004).

[54] International Finance Corporation, Performance Standards on Environmental and Social Sustainability (2012), http://bit.ly/1iF1TMv.

ensure that their stakeholders have access to a remedy.[55] It states that the remedy needs to satisfy seven criteria in order to be considered meaningful and effective. These criteria, which are set out in Principle 31, state that the remedy must be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.[56]

There is considerable overlap between the criteria relied on by the European courts and those in the UN's principles. Both require that the mechanisms be impartial and fair, and offer a meaningful remedy. In addition, given the fact that many of the IFC's non-contractual stakeholders are likely to lack legal expertise, it is particularly desirable that the mechanisms be easily accessible. Finally, in order to enhance confidence in the ultimate decisions, these alternative mechanisms should be independent.

This means that the test for determining if the IFC is offering non-contractual stakeholders a reasonable alternative means for protecting their rights is whether it is offering access to a mechanism that at least meets a minimum standard for accessibility, impartiality, fairness, independence, and the meaningfulness of the remedy.

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[55] United Nations Office of the High Commissioner for Human Rights, *Guiding Principles*, *supra*, principle 29 (Pillar 3).

[56] *Id.* at principle 31.

Unfortunately, the IFC's only potential alternate remedy, the Compliance Advisor Ombudsman, does not meet all the above criteria. It is accessible to all qualifying stakeholders and it is reasonably fair, although the complainant is not necessarily given an opportunity to respond to the evidence and arguments presented by the IFC's management.[57] It is not clearly impartial because the IFC's Board and senior management retain final decision making powers.[58] Moreover, it is not independent because the Compliance Advisor Ombudsman is appointed by and reports to the senior management of the IFC. In addition, it does not necessarily provide the complainants with a meaningful remedy because its findings and recommendations are non-binding.[59]

The failure of the Compliance Advisor Ombudsman to satisfy the criteria for an effective remedy means that the IFC does not satisfy its international legal obligations. Consequently, if the court upholds the IFC's immunity, it will be facilitating the IFC in committing a legal wrong.

In this situation, denying the IFC's claim to immunity will both protect the rights of non-contractual stakeholders to an effective remedy and respect the international legal rights and obligations of the IFC. The IFC, of course, is free to correct this situation and preserve its immunity from domestic jurisdiction by

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[57] IFC, Compliance Advisor Ombudsman Operational Guidelines, *supra*, § 2.

[58] *Id.*

[59] *Id.*

ensuring that in the future it offers all its stakeholders access to a mechanism that satisfies the criteria for an effective remedy.

* * *

The IFC, like many international organizations, has over time come to play a more extensive role in the affairs of its member states than its founders anticipated. This has led to more frequent and intensive engagement with non-contractual stakeholders in its member states than its founders expected. As a result, the IFC, like many international organizations, has in effect begun to use the doctrine of international-organization immunity—originally intended to be a shield to protect it from interference from member states—as a sword for warding off the claims of those who are adversely affected by its actions. To restore the doctrine of international-organization immunity to its original purpose, the IFC should only be granted immunity from suit if it can demonstrate that it is complying with its customary international legal obligations and respecting its non-contractual stakeholders' right of access to an effective remedy.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 5,524 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). This brief was prepared in 14-point Baskerville, a proportionally spaced typeface.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2016, I electronically filed the foregoing Brief of *Amicus Curiae* Daniel Bradlow in Support of Appellants with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the Appellate CM/ECF system, which will send notice to all counsel who are registered CM/ECF users.

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